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No. 07-373

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IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Boggs v. *Boggs*, 520 U.S. 833 (1997) 9, 11
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 6
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) 3, 4
McCarran Int'l Airport v. *Sisolack*, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007) 6, 7, 8
Southern Cal. Edison Co. v. *United States*, 226 F.3d 1349 (Fed. Cir. 2000) 2
United States v. *Causby*, 328 U.S. 256 (1946) 6

STATUTES AND REGULATIONS

49 U.S.C. § 40101(a)(4) 9
§ 40103(a)(2) 5
§ 47107(a) 8
§ 47110(c)(1) 9

14 C.F.R. pt. 77 2
14 C.F.R. § 77.23 2
§ 77.25 2

LEGISLATIVE HISTORY

H.R. Rep. No. 88-1002 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2063 9
S. Rep. No. 88-446 (1963) 9

OTHER AUTHORITY

Report of the President's Airport Comm'n, *The Airport and its Neighbors* (May 16, 1952) 9

ARGUMENT

The question presented by this case is critically important. The extraordinary state-law right to compensation that Nevada has recognized—and that the Ninth Circuit held is not preempted—undermines Congress's intent to ensure safe and cost-effective air travel, and will have untoward ripple effects throughout the national aviation system. In its *amicus* filing, the federal government does not argue that respondents' "jurisdictional" issues militate against review of this issue. Instead, it takes the remarkable position that federal law "encourages" municipalities to promote safe and affordable air travel by "relying to the maximum permissible extent on uncompensated zoning," US Br. at 19, yet is wholly indifferent when a State imposes crippling liabilities, potentially totaling *billions* of dollars, on a county that employs federally permissible zoning.

This claim is profoundly misguided. In making it, the government relies on the demonstrably erroneous view that *Jankovich* somehow resolved the pre-emption issue raised here. Its brief also reflects basic misunderstandings about *Sisolak*'s holding and the facts of this case. On these matters, which comprise the bulk of its submission, the government enjoys no expertise. On the preemption issue itself, the government offers a brief and conclusory argument that ignores the statute's text, structure and history, and rests entirely on non-binding guidance from the Federal Aviation Administration (FAA) and on what that guidance "*appears to contemplate*." US Br. at 20 (emphasis added). According to the government, Congress simply expected major airports to re-locate if state law compels them to purchase prohibitively

expensive airspace decades after they began operating.

The government's position appears to be driven by fears of its own potential liability, given its role in defining navigable airspace.[1] *Southern Cal. Edison Co.* v. *United States*, 226 F.3d 1349, 1357 (Fed. Cir. 2000) (government agency owed no deference when it has a financial interest in court's decision). Whatever the reason, the nation's sixth busiest airport, joined by every segment of the typically fractious aviation industry, deserves better. If petitioner is to operate under massive state-imposed takings liabilities—and to pass them on to a struggling airline industry—it should only be because this Court decides, after full briefing and plenary review, that Congress intended to permit such a harmful outcome.

1. The government claims *Jankovich* "clearly . . . determin[ed]" that States can "require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law." US Br. at 11. But the passage from *Jankovich* the government quotes to prove this assertion conclusively refutes it. The government claims that, if the *Jankovich* Court had believed that a State's power to require compensation was "limited to height restrictions that effected a federal taking," then it "could not have concluded that the state court's takings analysis" was consistent with federal law, "while simultaneously 'express[ing] no opinion'" on the federal takings analysis. *Id.* The government cites

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[1] The government denies that role, US Br. at 2, but FAA regulations determine when structures interfere with navigable airspace and thus define the navigable airspace itself. *See* 14 C.F.R. pt. 77, especially Section 77.23 ("Standards for Determining Obstructions") and Section 77.25 ("Civil Airport Imaginary Surfaces").

footnote 3 in *Jankovich* as support for this convoluted reasoning. But footnote 3 disproves its claim.

The ordinance's "validity" under the federal constitution turned on whether it effected an uncompensated "taking of private property for public use in violation of . . . the Fourteenth Amendment." *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487, 489-90 (1965). In footnote 3, the Court *declined to decide* whether the ordinance did, or did not, cause a federal taking. *Id.* at 495, n.3. Thus, the *Jankovich* Court:

- had no basis for deciding whether Indiana had recognized a state taking where a federal taking would not be recognized;
- could not have decided, therefore, that the protections of the federal and state takings clauses diverged;
- and accordingly had no conceivable basis for ruling that States can "require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law," US Br. at 11.

Thus, in stating that "no substantial claim can be made that Congress intended to preclude such an application of state law as is involved in the present case," *Jankovich*, 379 U.S. at 494, this Court could not have been referring to an application of state law that exceeded the protections of the federal takings clause.[2]

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[2] Indeed, as petitioner has shown, Pet. at 24-25, and the government nowhere disputes, the ordinance in *Jankovich* caused a federally cognizable taking because it prevented use of respondents' toll road. *Jankovich*, 379 U.S. at 488.

Moreover, the Indiana court's decision precluded consideration of the preemption claim raised here. The state court had "held that the challenged ordinance violated . . . the Indiana Constitution *as well as* the Fourteenth Amendment of the federal Constitution." See Mem. for the United States as *Amicus Curiae* at 2, *Jankovich* (filed Nov. 18, 1964) (emphasis added). Because, unlike the Ninth Circuit below, the state court found takings under *both* state and federal constitutions, the case did not and could not have raised the issue whether federal law preempts "a state constitutional right to compensation for public use of navigable airspace *that causes no federally cognizable deprivation*" of property. Pet. at 18 (emphasis added).

This is why the *Jankovich* petitioners posed a different preemption claim (which the government never bothers to quote). They argued that the state court's "nullification of airport zoning" was "wholly incompatible with the federal scheme," which "is based on the necessity of recourse to airport zoning." Br. for Ptrs. at 53-54, *Jankovich* (filed Oct. 9, 1964), *available at* 1964 WL 81275. This claim thus rested on two premises—*i.e.*, that federal law deemed airport zoning "essential" and that "the decision of the Indiana Supreme Court . . . signifie[d] the total nullification of airport zoning," *Jankovich*, 379 U.S.at 493—neither of which addressed whether the protections of the federal and state takings clauses differed. The Court rejected this different preemption claim because the Indiana court's opinion did "not portend the wholesale invalidation of all airport zoning laws," *id.*—not because federal law permits States to subject airport zoning restrictions to more stringent constitutional requirements than the federal takings clause imposes.

Thus the government's claim that *Jankovich* "address[ed] a preemption question that was not substantively different from the one presented here," US Br. at 12, is just wrong. Accordingly, it is irrelevant that the statutory provision petitioner relies on here (*i.e.*, the public's right of transit under 49 U.S.C. § 40103(a)(2))[3] "existed in essentially [its] current form" when *Jankovich* was decided. US Br. at 11. Petitioner does not claim that everyone in *Jankovich* "overlooked" this provision, *id.* at 12, but rather that the public's right of transit had no bearing on the claim that the Airport Act mandated airport zoning—a claim petitioner is not making here.

In short, the government's characterization of *Jankovich*'s holding is indisputably wrong. Moreover, the government does not even address the argument that, if *Jankovich* did dismiss the preemption claim raised here, it should be reconsidered. On the government's view, the Court determined the preemptive force of a statutory provision that it never mentioned, that the Solicitor General never cited or discussed, and that the petitioners did not rely on. See Rep. Br. of Ptr. at 4 n.3. Such a *sub silentio* disposition of an important, and unlitigated, preemption issue plainly warrants reconsideration in light of the significant effects of the massive state takings liabilities petitioner now faces.

2. Rather than address these effects, the government tries to hedge its bets. It concedes that *Jankovich* "should not be read to hold that federal law places *no* constraints on a State's ability to require compensation for airport-related zoning," but

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[3] Contrary to the government's claim, US Br. at 12, petitioner has not argued that national sovereignty in U.S. airspace preempts respondents' takings claim.

argues that this case is "an unsuitable vehicle for clarifying the possible limits on state authority." US Br. at 16. The government's "vehicle" concerns, however, are equally groundless.

First, it is not at all "unclear," US Br. at 16, whether *McCarran International Airport* v. *Sisolak* mandates compensation in the absence of an ordinance (it does not), or to a landowner who fails to show "that any actual overflights had an adverse impact on the property's value," US Br. at 16, (it indisputably does). *Sisolak* recognized "a regulatory per se taking." 137 P.3d 1110, 1119 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007). A *regulatory* taking depends upon an ordinance. Indeed, *Sisolak* addressed "whether the *height restrictions* constituted a regulatory per se taking," *id.* (emphasis added), and distinguished the overflight analysis of *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), based on the ordinances. See 137 P.3d at 1124 ("because this case does involve ordinances affecting use of property, we conclude that a regulatory per se taking occurred without resorting to the low and frequent overflight analysis"). It thus held that "the *ordinances* authorize the permanent physical invasion of [Sisolak's] airspace." *Id.* (emphasis added).

And a compensable *per se* taking under *Sisolak* does not depend on proof that "actual overflights had an adverse impact on the property's value." US Br. at 16. The government suggests Nevada courts might "conclude that, where recurring overflights do not affect the value of the subjacent land, the just compensation owed is zero." *Id.* This is pure fantasy. *Sisolak* upheld a damages award of over $16 million even though the landowner *dismissed all claims alleging property devaluation from overflights.* See

137 P.3d at 1118. In light of the dismissal of those claims, it is clear that *Sisolak* merely requires the *existence* of overflights (otherwise, the Nevada court believed, there is no physical invasion of airspace); their frequency or effect on underlying land, however, is irrelevant.[4]

Nor do the facts of this case pose any obstacle to review. The government notes that the district court found that an increase in overflights "directly, substantially, and immediately interfered with the enjoyment and use of [respondents'] property." US Br. at 17. These findings, however, were made 18 months before *Sisolak*. On appeal, respondents *abandoned* any claim based on overflight impacts and instead argued only that the ordinances "took the[ir] *airspace*," that they had "showed injury in the loss of the subject *airspace*," and that this "taking of the subject *airspace* . . . is a per se taking." Resps. Ninth Cir. Br. at 41-42, 46 (emphases added); see also *id.* at 34-35. Indeed, the Ninth Circuit overturned the district court's damage award because it did not include "just compensation for a taking of airspace" up to the 500 foot level, as *Sisolak* required. App. 22a.[5]

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[4] The *Sisolak* district court based the taking not on evidence of 100 overflights per day, US Br. at 16, but on evidence that, "*on occasion*, aircraft flew over Sisolak's property" below 500 feet above ground level, and on defendants' acknowledgement that aircraft flew over the property at such altitudes. 137 P.3d at 1117 (emphasis added; quotation marks omitted).

[5] The government argues that, because *Sisolak* said that "use of the airspace" may be regulated without causing a taking, it left open the possibility that restrictions higher than Ordinance 1221 might not cause takings where airspace is not "useable." US Br. at 15 (internal quotation marks and citation omitted). That observation is irrelevant here, because this case also involves Ordinance 1221. It is also refuted by *Sisolak*; the

In another misleading suggestion, the government claims respondents' damages will be measured by reference to the diminution in the value of the land, which supposedly demonstrates that the taking "is not fundamentally different from" that in *Jankovich*. US Br. at 17-18. But, as the quotations from the Ninth Circuit and respondents' brief above make clear, respondents' damages are for loss of airspace. The means of calculating their damages do not show otherwise: the value of the airspace is measured by determining the difference in the value of respondents' property with a building *that occupies the airspace* versus its value without such a building. See Resps. Ninth Cir. Br. at 37 (defining "highest and best use" as "a hotel and casino with plans for vertical construction *into the subject airspace*") (emphasis added). Respondents' state-law right to millions of dollars in compensation for an ordinance that causes no federally cognizable taking thus makes clear that a *Sisolak* taking is "fundamentally different" from the taking that occurs when an airport zoning ordinance precludes all use of a toll road. See note 2, *supra*.

3. Finally, the government opposes review because petitioner has supposedly failed to prove its preemption claim. US Br. at 18. Of course, the County has only filed a petition for a writ of certiorari, not a merits brief. Even so, it has shown, Pet. at 19-23, Rep. Br. of Ptr. at 5-7, that Congress strongly encouraged use of zoning to promote aviation safety, 49 U.S.C. § 47107(a)(10); required airports to be financially self-sufficient, *id.* § 47107(a)(13)(A); and established "*economic*, efficient, and *low-priced*

County argued that, as a practical matter, Sisolak had no claim to use of the airspace, but the court rejected this claim "because NRS 493.040 vests ownership in the space above land, up to 500 feet." *Sisolak*, 137 P.3d at 1120 n.26.

services" as a primary goal of federal law, *id.* § 40101(a)(4) (emphases added). A state requirement to pay massive state takings liabilities for the very types of zoning ordinances Congress has actively promoted, and that are permissible under the Fifth Amendment, necessarily conflicts with federal law and "'stands as an obstacle to the accomplishment and execution of" Congress's objective of ensuring air travel that is safe *and economical*. *Boggs* v. *Boggs*, 520 U.S. 833, 844 (1997).

In fact, Congress stressed that, if municipalities lack the authority to adopt zoning restrictions, they need not "undertake action which is neither possible nor practical, *such as . . . purchas[ing] land adjacent to an airport where the sponsor cannot control its use by zoning*." H.R. Rep. No. 88-1002 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2063, 2068 (emphasis added). This is consistent with the recognition that "[t]he cost of acquisition of sufficient land . . . is frequently beyond the capabilities of a single community," Report of the President's Airport Comm'n, *The Airport and its Neighbors* 8 (May 16, 1952), and with Congress's position that it had "no intention of allowing airports to be priced out of existence." S. Rep. No. 88-446, at 24 (1963).

The government simply ignores this evidence of *Congress's* intent, and instead relies on FAA guidance. But the FAA itself encourages municipalities to prevent hazards "by relying to the maximum permissible extent on uncompensated zoning." US Br. at 19. Moreover, the fact that the FAA refuses to permit federal funds to pay for items that are not compensable under federal standards, *id.* at 21, shows that Congress authorized use of federal funds to aquire property interests, 49 U.S.C. § 47110(c)(1), only when necessary to avoid *federal* takings. This

confirms that Congress intended municipalities to pay takings damages only when the federal constitution requires such payment.

Ultimately, the strongest evidence the government musters for its position are statements in FAA guidance that "appear[] to contemplate variations among local property rights regimes." US Br. at 20. But the apparent contemplations of non-binding agency guidance is hardly evidence that Congress intended to permit imposition of massive state takings liability. This is particularly true where the government (1) ignores petitioner's showing that the guidance cannot plausibly be read in this manner, Rep. Br. of Ptr. at 8, and (2) never explains how such an intent can be reconciled with Congress's indisputable desire to promote air travel that is safe *and* economical.

Instead, the government facilely suggests that state law compensation requirements that exceed federal constitutional requirements "may sometimes cause airports to be located in relatively inconvenient venues," but "[m]uch of th[at] inconvenience . . . will be visited locally." US Br. at 20. The facts of this case refute this claim. McCarran was built far from Las Vegas and remained isolated for decades. Pet. at 8. The city encroached upon the airport, and the tourism McCarran facilitated eventually converted the surrounding desert scrub into commercially valuable property. McCarran cannot now relocate to a less convenient locale. Instead, it must compensate landowners, like respondents, who bought property next to a major airport, yet claim the right to build high-rise casinos and hotels next to runways.

These financial burdens, moreover, are *not* "visited locally," US Br. at 20. They must be passed on to the airlines, and eventually to millions of travelers to Las

Vegas each year. Pet. at 20 n.7. Thus, *Sisolak* operates like the kind of state-law tax on interstate travel that the government admits "would raise significant preemption concerns." US Br. at 15. Nevada's attempt to obtain the benefits of the national aviation system, while transferring a central cost of that system—the necessity of navigable airspace below 500 or 1,000 feet—to out-of-state travelers stands as an obstacle to "'the full purposes and objectives of Congress.'" *Boggs*, 520 U.S. at 844.[6]

* * * *

The government's submission reflects an astonishing indifference to an industry reeling from unprecedented congestion and fuel costs, and to the plight of a state entity that has promoted safe and efficient air travel in precisely the manner federal law encourages. This Court should not conclude that federal law is equally indifferent based on misguided claims of *sub silentio* rulings and vague inferences drawn from non-binding guidance. Instead, the Court should grant the petition and resolve the question presented following plenary review.

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[6] Petitioner has never disclaimed preemption based on the extent of the burden *Sisolak* imposes. *See* US Br. at 18. Instead, petitioner has emphasized this very burden in explaining why the *Sisolak* rule is preempted. Pet. at 19-23.

CONCLUSION

For the foregoing reasons and those stated in the petition, reply brief and the *amicus curiae* brief, certiorari should be granted.

Respectfully submitted,

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